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THE RELATIONS BETWEEN EQUITY AND LAW.

AT the last annual meeting of the Association of American Law Schools, Professor Walter W. COOK contributed an interesting address on Equity and its relation to Law. Taking as his more specific subject, "THE PLACE OF EQUITY IN OUR LEGAL SYSTEM," the speaker began his discussion with an extensive quotation from MAITLAND'S LECTURES ON EQUITY,—a work cordially welcomed by that distinguished scholar's many admirers upon its posthumous publication in the fall of 1909. The latter part of the quotation was as follows:

> "I do not think that any one has expounded or ever will expound equity as a single, consistent system, an articulate body of law. It is a collection of appendixes between which there is no very close connection. If we suppose all our law put into systematic order, we shall find that some chapters of it have been copiously glossed by equity, while others are quite free from equitable glosses. * * *
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> "When, some years ago, the new scheme for our Tripos was settled, we said that candidates for the second part were to study the English Law of Real and Personal Property and the English Law of Contract and Tort, with the equitable principles applicable to these subjects. It was a question whether we ought not to have mentioned equity as a separate subject. I have no doubt, however, that we did the right thing. To have acknowledged the existence of equity as a system distinct from law would in my opinion have been a belated, a reactionary measure. I think, for example, that you ought to learn the many equitable modifications of the law of contract, not as part of equity, but as part, and a very important part, of our modern English law of contract."

After quoting these words, Mr. COOK continued:

> "I need not tell you that an examination of the announcements of our American law schools reveals no signs of any disposition to adopt Mr. MAITLAND'S view. We are, in his phraseology, acknowledging the existence of equity as a sys-

tem distinct from law, and so are following—if he be right —a 'belated and reactionary' course of procedure. Take up the catalogue of almost any American law school, and what do you find? As a typical example—selected because it is typical, and in no respect whatever exceptional or peculiar—let us read from the catalogue of the Law School of Stanford University:

'Equity I.—Historical development of equity; *relation between equitable rights and powers and legal rights and powers; general principles relating to jurisdiction, procedure and remedies;* specific performance of contracts with special emphasis on the relations between vendors and purchasers of realty; introduction to mortgages; bills for an account; specific reparation and prevention of torts, including waste, trespass, nuisance, disturbance of easements, infringement of patents and copyrights, interference with business relations.' [*Italics are those of present writer.*]

* * * "My thesis this evening is that Mr. MAITLAND is right, and that our American treatment of equity is belated and reactionary, because it is unscientific, both from the point of view of analysis and from that of educational expediency."[1]

The present writer having been absent from the meeting referred to, he of course missed the opportunity of hearing or discussing the address in which the foregoing appears. That being so, he now takes pleasure in saying, at the very outset, that he finds himself in substantial accord with many of the views expressed by Mr. COOK, and he believes that law teachers are indebted to the learned speaker for a number of helpful suggestions relating to the law school curriculum. At the same time it would seem that, in his enthusiastic conversion to MAITLAND'S views, Mr. COOK has gone rather far in assuming and asserting that all American law schools have heretofore failed to recognize the fundamental ideas so justly emphasized by the lamented English scholar, and that these schools have hitherto "acknowledged the existence of equity as a system distinct from law."

As the present writer must confess to the authorship of the above-quoted announcement from the Stanford law catalogue—*including, of course, the part now italicized*—perhaps he will be pardoned for saying that, on reading the report of Mr. COOK'S address, he was immediately reminded of certain language used some years ago by Professor John C. GRAY in replying to a friendly critic:

"I sincerely approve of my learned friend's general criticism; that I do not think his illustration a happy one, is per-

[1] 3 Am. Law Sch. Rev. 173-174 (November, 1912).

haps natural enough. To applaud a sermon, but to believe that one's neighbors need it rather than one's self, is nothing new."[2]

It so happens that, ever since assuming charge of the above-mentioned course in equity some years prior to the appearance of MAITLAND'S book,—in connection, more especially, with that part of the course reading "relation between equitable rights and powers and legal rights and powers," etc.,—the present writer, after "developing" the various points by student discussion of decided cases and historical reading, has been in the habit of using with his classes both an analytical synopsis and a diagrammatic sketch,—each entitled "THE POSITION OF EQUITY IN THE LEGAL SYSTEM," and each intended to enforce not only those matters now emphasized by Mr. COOK, but also certain other phases of the subject believed to be in need of recognition and emphasis.[3] Some of the fundamental and

[2] Remoteness of Charitable Gifts (1894), 7 Harv. Law Rev. 406, 414.

[3] A word of explanation seems necessary here. Since, as regards the regular law students, the various problems of equity have always been handled by the case method so as to foster the maximum of mental initiative and power on the part of the individual student, the formal synopsis and diagram referred to would never have been called forth by the exclusive needs of the writer's professional classes. On the contrary they were originally prepared, in the fall of 1906, as the introductory part of a syllabus accompanying a series of twelve lectures on equity given as a portion of a course conducted by the entire law faculty for advanced non-professional students.

It is this synoptic and analytical treatment which is incorporated, with slight revision, in the present article.

The subordinate question raised by Mr. Cook, namely, whether any separate course in equity should be given, is purely one of pedagogical expediency.

As will be remembered, Mr. Cook says: "My thesis this evening is that Mr. Maitland is right, and that our American treatment of equity is belated and reactionary, because it is unscientific, both from the point of view of analysis and from that of educational expediency."

Of course one reply to this suggestion would seem to be that if the indictment were valid, the brilliant Maitland would himself stand convicted by the "autoptic proference" of his own book. Indeed, Mr. Cook, in his enthusiasm for the merely scientific side of equity as presented in Maitland's work, seems to have overlooked the fact that the latter, as stated in the preface, gave a separate course in equity "over a period of some eighteen years."

Although it is foreign to the purpose of the present article to discuss in detail the merely incidental questions of the curriculum, one or two general observations may be ventured. While not a little may be said for Mr. Cook's pedagogical proposition as to teaching the law and the equity of contracts together in a single course and pursuing a like method in relation to quasi-contracts and torts, it seems well to remember that the validity of the proposition is not conclusively established merely by pointing out that law and equity are, scientifically considered, but cross-sections of the more usual subjects in the curriculum. If the latter premise were adequate for the suggested conclusion, what would be the fate of the separate courses on other subjects such as damages, persons, and conflict of laws? They also are but cross-sections of such topics as contracts, torts, property, etc., and might be taught as such. Indeed, just as the equitable phases of the law are to some extent combined with the legal phases in certain courses such as mortgages, corporations, partnerships, etc., so, in the various law schools, damages, persons and conflict of laws are in some measure given the combination form of presentation. Professor Smith's case book on Corporations contains a chapter on foreign corporations, and Professor Ames' case book on Bills and Notes has

general problems of equity thus treated—that is, those concerning the complicated relations and delicate interplay of rules of equity and rules of law—while always fascinating to students, are by no means free from intrinsic difficulty. Accordingly, in view of the new interest aroused by Mr. COOK'S address, it has occurred to the writer that the above-mentioned synopsis and the accompanying diagram might not be without interest to some of the readers of this law review, especially as so many of the latter are law school students still actively endeavoring to understand and to solve the wonderful intricacies and problems that for various historical reasons have become imbedded in the Anglo-American dual system of law and equity.

Because of the fact that the latter class of readers are primarily in view, it has seemed best, for the sake of clearness and perspective, to preserve the analytical and compendious form of presentation, and to add in "supplemental notes" such historical and explanatory discussions, quotations, and references as might be helpful to students of the subject. With the same idea in mind, many additional "examples" have been incorporated in the text in order to indicate more adequately "the conflict between equity and law." The quotations in the supplemental notes are made largely from the standard historical works. Here and there in the notable volumes of POLLOCK & MAITLAND, HOLDSWORTH, KERLY, JENKS and others, there are valuable passages recording and explaining the essential causes underlying the development of equity; but these are at present so scattered among the several works named as to be very inconvenient, if not inaccessible, for the average student. Even with the various quotations and discussions appended, however, the present article is, of course, intended merely as an introductory

a heading "conflict of laws." The same learned author's case book on Trusts deals extensively with the equitable property rights of husband and wife, although marital property interests are treated at large in the various case books on Persons and, to some extent also, in the case books on Property. So on indefinitely.

In short the exact combination of topics in each case book or course has generally been determined primarily by convenience or accident rather that by logic or jurisprudence; and thus it is that the various courses, instead of being mutually exclusive, necessarily overlap at many points.

All this being so, it is obvious that the law school curriculum, even when considered as an entirety, conspicuously fails to give the student an appreciation of the common law as a coordinated system, or an understanding of the relations between the various parts of such system. To accomplish this very desirable purpose, nothing would seem to suffice save a solid and comprehensive course in what is commonly styled "analytical jurisprudence,"—a subject which in many law schools has hitherto been sadly neglected. Apart from the important purpose just indicated, the study of the latter subject and the discipline afforded thereby are, it is believed, of inestimable value, even if tested by the narrowest standards as to what is useful and "practical" in legal education.

sketch; the "filling in" must come from the study and discussion of concrete cases and problems.

Despite what has thus far been said, there would be considerable hesitation in presenting these mere working materials, were it not for those parts relating to "the conflict between equity and law" and "the supremacy of equity over law." It is only in these matters that the writer finds it necessary to take issue with the views expressed by Professor MAITLAND and other well-known writers. Our distinguished English author, throughout his entertaining series of lectures, maintains, with ever-recurring emphasis, that the relation between the rules of equity and the rules of law, with only one or two possible exceptions, "was not one of conflict."[4] In order to have an adequate statement of Professor MAITLAND'S views before us, it will be necessary to give a fairly lengthy quotation from his LECTURES:

> "Then as to substantive law the Judicature Act of 1873 took occasion to make certain changes. In its 25th section it laid down certain rules about the administration of insolvent estates, about the application of statutes of limitation, about waste, about merger, about mortgages, about the assignment of choses in action, and so forth, and it ended with these words:
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> 'Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter, the rules of equity shall prevail.'
>
> "Now it may well seem to you that those are very important words, for perhaps you may have fancied that at all manner of points there was a conflict between the rules of equity and the rules of common law, or at all events a variance. But the clause that I have just read has been in force now for over thirty years, and if you will look at any good commentary upon it you will find that it has done very little —it has been practically without effect. You may indeed find many cases in which some advocate, at a loss for other arguments, has appealed to the words of this clause as a last hope; but you will find very few cases indeed in which that appeal has been successful. I shall speak of this more at large at another time, but it is important that even at the very outset of our career we should form some notion of the relation which existed between law and equity in the year 1875. *And*

[4] Lectures on Equity (1909) p. 17.

the first thing that we have to observe is that this relation was not one of conflict. Equity had come not to destroy the law, but to fulfil it. Every jot and every tittle of the law was to be obeyed, but when all this had been done something might yet be needed, something that equity would require. * * *

"Let me take an instance or two in which something that may for one moment look like a conflict becomes no conflict at all when it is examined. Take the case of a trust. An examiner will sometimes be told that whereas the common law said that the trustee was the owner of the land, equity said that the *cestui que trust* was the owner. Well here in all conscience there seems to be conflict enough. Think what this would mean were it really true. There are two courts of coordinate jurisdiction—one says that A is the owner, the other says that B is the owner of Blackacre. That means civil war and utter anarchy. Of course the statement is an extremely crude one. it is a misleading and dangerous statement—how misleading, how dangerous, we shall see when we come to examine the nature of equitable estates. Equity did not say that the *cestui que trust* was the owner of the land, it said that the trustee was the owner of the land, but added that he was bound to hold the land for the benefit of the *cestui que trust. There was no conflict here. Had there been a conflict here the clause of the Judicature Act which I have lately read would have abolished the whole law of trusts.* Common law says that A is the owner, equity says that B is the owner, but equity is to prevail, therefore B is the owner and A has no right or duty of any sort or kind in or about the land. Of course the Judicature Act has not acted in this way; it has left the law of trusts just where it stood, because *it found no conflict, no variance even, between the rules of the common law and the rules of equity.*"[5]

The same views seem to have been entertained by Professor LANGDELL, in whose SUMMARY OF EQUITY PLEADING, we find the following:

"Indeed, it may be said without impropriety that equity is a great legal system, which has grown up by the side of the common law, and which, while *consistent* with the latter, is in a great measure independent of it."[6]

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[5] Ibid., pp. 16-18. (The italics and blackface in this and the other quotations to be given are those of the present writer.)

See, in addition, the similar views expressed by the learned author at pp. 46, 152, 154, 156, 169.

[6] (2nd ed., 1883) p. 41.

And in the same learned author's BRIEF SURVEY OF EQUITY JURISDICTION:

> "Equity cannot therefore, create personal rights which are unknown to the law * * * nor can it impose upon a person or a thing an obligation which by law does not exist * * *. To say that equity can do any of these things would be to say that equity is a separate and independent system of law, or that it is superior to law."[7]

So also, similar ideas seem to have been expressed by Mr. ADAMS in his treatise on EQUITY,[8] and, perhaps, by Professor SCHOFIELD in his reply to Professor COOK.[9]

As against the proposition of these various scholars that there is no appreciable conflict between law and equity, the thesis of the present writer is this: while a large part of the rules of equity harmonize with the various rules of law, another large part of the rules of equity—more especially those relating to the so-called exclusive and auxiliary jurisdictions of equity—conflict with legal rules

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[7] (1887) 1 Harv. Law Rev. 55, 58. See also the same article, p. 59, and passim; and a later article (1900) 13 Harv. Law Rev. 659, 673, 677.

In the first article above cited Professor Langdell says, at the very outset: "Equity jurisdiction is a branch of the law of remedies."

It is submitted that this statement is inadequate and misleading; for it appears that, from the time of the very earliest cases now available down to the present, equity has always recognized and vindicated what would now be called, as a matter of analysis, exclusively equitable antecedent (or primary) rights. See, for example, Brampton v. Seymour (1386) 10 Seld. Soc. Sel. Cas. in Ch. No. 2 (The defendant, having secured a release from the plaintiff by pretending that he would hand over certain moneys, had thereupon refused to make payment); Grimbsy v. Cobham ibid., No. 61 (bill for restitution of money secured by fraud); Wace v. Brasse (1399) ibid., No. 40 (bill for reimbursement for money laid out by plaintiff on the faith of defendant's promise to convey property to the former and his intended wife,—defendant's promise having subsequently been broken).

See also ibid., Nos. 56, 109, 116.

[8] Adams on Equity (8th ed., 1890) Introd., p. xxix: "The principle by which it [the Chancellor's authority] was regulated appears to have been the one above stated, viz., that of affording an effectual remedy when the remedy at common law was imperfect, but not, as has sometimes been erroneously supposed, that of creating a right which the common law denied." See also ibid., pp. xxxiii-xxxiv.

[9] In 3 Am. Law Sch. Rev. p. 178, Mr. Schofield is reported to have said, in reply to Mr. Cook: "Is it true, as Mr. Cook says, that American law schools are following 'the belated and reactionary course of procedure of acknowledging the existence of equity as a system distinct from law'—meaning by 'a system distinct from law,' as I understand the phrase, a body of rival, clashing law, as distinguished from a body of law that forms part and parcel of the whole law of the land, viewed as a single, harmonious code? * * * The idea of equity as a system distinct from law is, and always has been, of course, a wrong idea. * * *"

and, as a matter of substance, annul or negative the latter *pro tanto.* As just indicated, there is, it is believed, a very marked and constantly recurring conflict between equitable and legal rules relating to various jural relations; and whenever such conflict occurs, the equitable rule is, in the last analysis, paramount and determinative. Or, putting the matter in another way, the so-called legal rule in every such case has, *to that extent,* only an apparent validity and operation as a matter of *genuine* law. Though it may represent an important *stage of thought* in the solution of a given problem, and may also connote very important possibilities as to certain other, closely associated (and valid) jural relations, yet as regards the very relation in which it suffers direct competition with a rule of equity, such a conflicting rule of law is, *pro tanto,* of no greater force than an unconstitutional statute.[10]

If all this be so, it would seem to follow that the brilliant historian's discussion of the eleventh and last subdivision of the 25th section of the Judicature Act of 1873 is inadequate and misleading. If this particular subdivision, considered as an isolated entity, has, as asserted by MAITLAND, "produced very little fruit," one sufficient explanation would be that this last provision was evidently added only out of abundance of caution. Even if it had not been enunciated *in ipsissimis verbis,* such a provision would have been implicit in the language and intent of the act as a whole. But, more than that, the full content of subdivision 11 had already been covered, with explicit and industrious formality, by the seven subdivisions of section 24 and the first ten subdivisions of section 25. Although, in these preceding subdivisions, nothing was said *in very terms* concerning the conflict of law and equity, it is clear that they were intrinsically sufficient for that purpose, and that the framers of the act thought that they had been regulating precisely that sort of conflict; for do they not say in the final subdivision of section 25:

> "Generally in all matters *not hereinbefore particularly mentioned,* in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail."

The reasons already given would seem adequate to explain why subdivision 11, considered as a separate entity, has appeared to have so little effect. But, in addition, it is well to remember that the

[10] See supplemental note 36, post, p. 570.

Common Law Procedure Act of 1854, in providing both for equitable defenses and for equitable replications had at that comparatively early day brought about a partial "fusion" of law and equity; so that already for two decades prior to their enactment the essential scope and operation of the Judicature Acts, and likewise many of the concrete problems involved, had been made familiar to the bench and bar of England. The fundamental idea of subdivision 11 of section 25 was anything but a novelty![11]

The more concrete presentation of the typical cases of "conflict" between law and equity and the "supremacy" of the latter over the former will be found in the appropriate parts of the analytical synopsis immediately following, and in the supplemental notes relating thereto.[12]

This synopsis, intended, as heretofore stated, merely to give the student a concise introduction to the subject of equity, consists of three divisions, namely:

Part I: The Position of Equity in the Legal System.

Part II: Historical Sketch of Equity.

Part III: Fundamental Characteristics of Equity.

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[11] See supplemental note 19, post, p. 565.

[12] In connection with the present matter, it is interesting to note the eulogistic statement to be found in Fisher's Biography of Maitland—a work greatly prized by the present writer as one of the many admirers of the brilliant historian. Evidently unaware that Langdell and his followers had anticipated Maitland in expressing the view that law and equity do not conflict, Mr. Fisher emphasizes this supposed truth as a great discovery by the English scholar, and gives credit commensurate therewith: "What is equity and what is its relation to the common law? So simple and fundamental do these questions appear to be that one would imagine that the correct answer to them must have been given again and again. It is one of those numerous cases in which a truth which appears to be quite obvious as soon as it is pointed out has lain if not unpreceived, at least imperfectly perceived, because the proper perspective depends upon an unusual combination of studies. Maitland, doubly equipped as an historian and a lawyer, found no difficulty in demonstrating two propositions which had never been clearly stated before, first that 'equity without common law would have been a castle in the air and an impossibility,' and second 'that we ought to think of the relation between common law and equity not as that between two conflicting systems but as that between code and supplement, that between text and gloss.' Such observations will soon savour of platitude. That equity was not a self-sufficient system, that it was hardly a system at all but rather 'a collection of additional rules,' that if the common law had been abolished equity must have disappeared also, for it presupposed a great body of common law, that normally the relation between equity and law has not been one of conflict, for the presence of two conflicting systems of law would have been destructive of all good government—such propositions only require to be stated to meet with acceptance. Yet it was left to Maitland to state them. * * * Perhaps there is no greater proof of originality than the discovery of truths which have no surprising quality about them except the length of time during which they have gone unnoticed or obscured." (Life of Maitland, pp. 70-71.)

PART I.

THE POSITION OF EQUITY IN THE LEGAL SYSTEM.

I. The term "equity" as used in legal discussions is not to be confused with equity in the sense of natural justice; on the contrary the term is employed to denote a certain division of the law.[1] [13]

II. Law (*in the broad sense*) is divisible "vertically" into law, or common law (*in the narrow sense*) and equity.[2]

A Law, or common law (*in the narrow sense*), consists of that part of the law (*in the broad sense*) which has been developed in the so-called courts of law (or common law courts).

B Equity consists of that part of the law (*in the broad sense*) which has been developed in courts of chancery (or courts of equity).

III. Private law (*in the broad sense*), including both law and equity, is divisible "horizontally" into the various subjects indicated by the diagram accompanying this outline;[2] this list is not intended to be exhaustive.

IV. From the foregoing, it follows that for an adequate treatment of any subject in the law such, e. g., as property, contracts, or torts, it is necessary to consider both the law and the equity relating to such subject.

PART II.

HISTORICAL SKETCH OF EQUITY.

General References:

SPENCE, EQUITABLE JURISDICTION (1846), Vol. I., pp. 321-349.

KERLY, HISTORY OF EQUITY (1890), Chapters I.-V.

POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW (2nd ed., 1905), Vol. I., pp. 150-151; 170-171; 189-197.

HOLDSWORTH, HISTORY OF ENGLISH LAW (1903), Vol. I., pp. 194-263.

POLLOCK, THE EXPANSION OF THE COMMON LAW (1904), pp. 53-80; THE SCALES OF JUSTICE.

I. The *dual* system of law and equity can be understood only by reference to its historical development.

A Such a system was not inherently necessary, as, conceivably, *all* rules of law (in the broad sense) might have been developed in a single system of courts.[3] (Compare *infra*, the "fusion of law and equity," part II., II., B.)

B The system is to be accounted for by the incidents of history.[4]

II. Origin and development of equity.

A Earlier development and administration of equity.

1. Courts of equity and their doctrines were made necessary by the retarded development of the law courts and their doctrines.

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[13] This and the following notes will be found at the end of this article under the heading "Supplemental Notes."

a. Characteristic features of the law courts in the latter half of the 13th century, when equity took its origin.
   i The king's powers of administering justice: from time immemorial it was the king's prerogative to administer justice to his subjects either in person or by delegation to others.[5]
   ii The king made a partial delegation of judicial power to appointed judges,—the king's courts consisting, in the latter part of the 13th century, of the King's Bench, the Common Bench (or Common Pleas), and the Exchequer.
   iii Delegation of such power was made specifically in each case by writ issued from the office of the chancellor in the name of the king.[6]
   iv The case in court had to conform to the writ, the common law judges having final power to quash the writ whenever it was deemed defective or inadequate to cover the facts of the plaintiff's case.[7]
   v In the latter half of the 13th century the chancellor's powers of inventing new writs to meet the advancing needs of society received radical checks, and a greatly retarded development of law ensued.[8]

b. Resultant defects of above system of law courts and their doctrines.
   i Defects of substantive law: inadequacy of rights, both primary and remedial. (This topic to be exemplified in the treatment of the various branches of the law.)
   ii Defects of the adjective law: inadequacy of the common law procedure and remedies.[9]

c. Attempts to remedy these defects.
   i Results of legislative action, Statute of Westminster II., 13 Ed. I. (1285), c. 1, sec. 24, inadequate.[10]
   ii Gradual establishment of new system of courts successful: courts of chancery, or courts of equity.

The important stages in the earlier development of courts of equity.

a. By reason of his judicial prerogative,—his "residuary jurisdiction,"—the king could directly exercise judicial powers in cases where complainants could not, for some reason, gain relief from the ordinary courts.[11]

b. The prerogative jurisdiction was exercised originally by the king himself in conjunction with his select council, consist- of the chancellor, judges, and other high officials.[12]

c. This extraordinary jurisdiction was gradually delegated to the chancellor and his subordinates.
   i The office of chancellor existed before the conquest and was continued by William I.

ii After the conquest the chancellor became the most important officer of the king's government, being his personal adviser and representative—"the king's secretary of state for all departments."[13]

iii From early times the "original writs" had been issued from the office of the chancellor;[14] and by the reign of Edward III, (1326-1377) he had acquired a limited *ordinary,* or common-law, jurisdiction. This *ordinary* jurisdiction must be distinguished from his extraordinary, or equitable, jurisdiction.[15]

iv By the reign of Edward I. (1272-1307) cases were occasionally referred by the king or the select council to the chancellor for his sole decision, he being specially competent to deal with such cases by reason of his familiarity with legal and judicial matters.

v By the reign of Edward II. (1307-1326) such reference was very common; and by the reign of Edward III. (1326-1377) the chancery was regarded, in some measure, as a regular court.

vi In 1349 Edward III., by a general writ addressed to the sheriff of London, directed that petitions relating to the grant of the king's grace should be brought before the chancellor or the keeper of the privy seal.

vii For a long time, however, the judicial functions of the chancellor and those of the council continued to be closely associated; and not until the latter part of the 15th century did the equitable jurisdiction become exclusively that of the chancellor.[16]

viii The struggle for supremacy between the court of chancery and the courts of law was marked, from the beginning of the reign of Richard II. (1377-1399), by numerous petitions presented by the Commons against alleged abuses on the part of the chancellor; and by various Acts of Parliament recognizing his jurisdiction and to some extent regulating it,—more especially the Stat. 4 Hen. IV. (1403), c. 8 and the Stat. 4 Hen. IV. (1403), c. 23.[17]

ix The supremacy of the court of chancery in relation, more especially, to the granting of injunctions against the bringing of actions and the enforcing of judgments at law was settled when, after the notable controversy between Lord Chancellor ELLSMERE and Chief Justice COKE, James I., by a prerogative decree issued in 1616, upheld the jurisdiction of the chancellor.[18]

B Later development and administration of equity: the "fusion of law and equity." (Compare *supra,* Part II., I., A.)

1. In the 19th century radical changes were made in the administration of equity and law.
2. In regard to substance, as distinguished from form, these changes in administration have not, for the most part, modified the *conjoint* operation of legal and equitable *primary* rights, or the *conjoint* operation of legal and equitable *remedial* rights: they have simply affected the modes by which legal and equitable rights are defined and vindicated.
3. The modern system of "reformed procedure" resulting from these changes.
   a. In England, since the Supreme Court of Judicature Acts of 1873 and 1875, going into effect in 1875, there has been a single system of courts administering both law and equity, —a single, simplified system of procedure and pleading being adopted as far as practicable.[19]
   b. In America there are now three typical systems for administering law and equity.[20]
      i In some states, e. g., New Jersey, there is still the *dual* system of law courts, with the two respective kinds of procedure.
      ii In the federal organization and in a number of states, e. g., Illinois, there is but a single system of courts administering both law and equity; but the forms of action, modes of pleading, etc., in a legal proceeding differ from those in an equitable proceeding. [The rules for equity practice in the federal courts have recently been greatly improved and simplified.]
      iii In many states, e. g., New York and California, there is but a single system of courts administering both law and equity and having, *in general,* as regards both legal proceedings and equitable proceedings, approximately the same forms of procedure, pleading, practice, etc.
         u David Dudley Field's New York code of 1848 and the simple "civil action."
         v This code is the model for the procedural codes of California and numerous other "code states."
         w There are still certain differences in procedure. Example: when "legal" issues are involved, trial by jury is guaranteed by the state constitution; whereas in the case of "equitable" issues, questions of fact (as well as of law) are tried by the judge.[21]

PART III.

FUNDAMENTAL CHARACTERISTICS OF EQUITY.

I. Guiding ideas and maxims.
   A In the early development of equity the guiding ideas were "conscience," "good faith," "reason," and, more rarely, "equity."[22]

B The following maxims are still of some influence in the determination of cases not decisively governed by more specific rule or precedent: they are, however, mere "guide-posts" and must not be taken literally.

1 Equity will not suffer a right to be without a remedy.
2 Equity regards that as done which ought to be done.
3 Equity looks to the intent rather than to the form.
4 Equity imputes an intent to fulfil an obligation.
5 Equality is equity.
6 He who seeks equity must do equity.
7 He who comes into equity must come with clean hands.
8 Where there are equal equities the first in time shall prevail.
9 Where equities are equal the legal title will prevail.
10 Equity aids the vigilant, not those who slumber on their rights.
11 Equity follows the Law. (That is, in dealing with "equitable estates" equity follows in large measure the analogy of "legal estates.")

C The general principles and specific rules of equity are now for the most part defined by a large and well organized body of precedents, so that the above general ideas and maxims are, at the present time, of comparatively slight importance.[23]

II. Characteristic features of equitable remedies and procedure: these may best be seen by contrasting equity and law as they now exist.

A Equitable remedial proceedings and decrees contrasted with legal remedial proceedings and judgments in relation to the general character of the relief granted.

1 Prevention *vs.* reparation.
a Legal remedies generally consist of mere reparation for the violation of a right.
b Equitable remedies, when necessary, consist in preventing the threatened violation of a right.

2 Specific reparation *vs.* non-specific reparation (damages).
a At law, if a right has been violated, the remedy is non-specific reparation (i. e., damages) except in the following cases of specific reparation:
i Recovery of possession of realty: ejectment, etc.
ii Recovery of possession of specific personal property: replevin, etc.
iii Recovery of damages for breach of an obligation to pay money. (In this case the specific character of the relief is a coincidence.)
b In equity specific reparation for a right already violated is granted unless there is good reason for granting merely non-specific reparation (i. e., damages).

B Equitable remedial proceedings and decrees contrasted with legal remedial proceedings and judgments in relation to the powers of courts and parties in securing their performance or satisfaction.

1 At law the judgment *in personam* creates a (new) obligation,[24] performance of which, however,—apart from what are now comparatively rare cases of arrest or execution against the person,—is not coerced by duress of impending or actual imprisonment.[25]

a In ordinary judgment for damages, satisfaction is had from proceeds realized from sale of defendant's property by sheriff empowered by writ of execution.

b In judgment for recovering possession of the physical corpus of realty or personalty, sheriff, acting by authority of a writ of possession, forcibly ousts defendant and puts plaintiff in possession.[26]

2 In equity the decree creates a (new) obligation,[27] performance of which by the obligee is usually coerced by duress of impending or actual imprisonment for contempt of court in case of disobedience.[28]

a This is usually a sufficient sanction to secure performance of the decree obligation.

b In certain cases of obstinacy, however, there are additional modes of satisfaction or coercion.

i Writ of sequestration.

ii Writ of assistance.[29]

C Equitable remedial proceedings and decrees contrasted with legal remedial proceedings and judgments in relation to parties, conditions, administration, and advice.

1 Equity can deal with a controversy to which there are more than two parties (or sets of parties) not identified in interest: law cannot.

Example 1: Partial assignment of a chose in action,—obligor, assignor and partial assignee.

Example 2: Suretyship,—creditor, principal obligor and surety obligor.

2 Equity may, when necessary or just, give conditional decrees: law pronounces unconditional judgment finally in favor of one party.

Example 3: An equity court's refusal of a temporary injunction in a patent infringement case on condition that the defendant keep account of all sales to be made pending the final hearing.

3 Equity may exercise administrative functions and powers, as in probate and receivership proceedings: law cannot.

4 Equity suits may be advisory as well as contentious: legal proceedings are merely contentious.

Example 4: A trustee's bill for advice from a court of equity.

III. General limitations of the remedial functions of equity courts.

A Limitations dependent on nature of equity procedure and remedies.

1 When an equity court gets personal jurisdiction over a defendant, it can grant a remedy by decreeing that the defendant do, or refrain from doing, a given act (e.g., the making of a conveyance), though the *res* subject to controversy is outside of the jurisdiction of the court.

2 Even though the *res* subject to controversy is within the jurisdiction, and even though the court have personal jurisdiction over the defendant, an equity court is not empowered to grant a remedy directly affecting the title to such *res*.
   a This is the rule apart from statute.
   b Equity courts have in modern times usually been given this power by statute.

3 When the *res* is outside of the jurisdiction, *a fortiori* the court is powerless to grant any remedy directly affecting the title to such *res*.
   a This is clear in the absence of statute.
   b Even a statute could not give the court such power.[30]

B Limitations not dependent on nature of equity procedure and remedies.

1 In general equity will exercise jurisdiction only where the law fails to give an adequate remedy.
   a Cases wherein law grants no remedy at all: defects as to primary, or antecedent, rights.
      Example 5: Trusts.
      Example 6: Mortgagor's equity of redemption.
   b Cases wherein law grants only an inadequate remedy: defects as to remedial and adjective rights.
      Example 7: Injunction against defendant threatening to cut ornamental trees on plaintiff's land.
      Example 8: Decree for "specific performance" of defendant's contract to convey land to plaintiff.

2 In some cases, even though the legal remedy of damages is inadequate reparation for the violation of an admitted right, equity will decline to exercise jurisdiction because of special impolicy or inexpediency.
   Example 9: Equity will refuse affirmative decree of specific performance of defendant's contract to render personal services, even though latter are unique.

3 Equity will sometimes, on general grounds of policy and expediency, decline to exercise jurisdiction in relation to a foreign *res* or other matter, even though the court has personal jurisdiction over the defendant.
   a Suit for partition of a foreign *res*.
   b Suit for winding up a foreign trust.
   c Suit to compel defendant to do some affirmative act in a foreign jurisdiction.[31]

4 Equity will not give relief against criminal acts as such, either by way of prevention or by way of reparation.
   a Equity will not concern itself with acts merely because they are crimes. (This, however, was not true in the very early days of equity.)
   b If a threatened criminal act, apart from the fact that it is criminal, would constitute a violation of a property right warranting equitable relief, equity will give relief.

IV. The relations between equity and law.

A THE CONCURRENCE OF EQUITY AND LAW: a jural relation may be concurrently legal and equitable,—that is, one recognized and vindicated both by law courts and by equity courts. As regards every such case there is, of course, no conflict between equity and law.

PRIMARY, OR ANTECEDENT, RELATIONS.[32]

Concurrent rights and correlative concurrent duties.[33]

Example 10: If X has ownership and possession of a tract of land with ornamental trees thereon, and Y, a stranger, is threatening to injure the latter, X's right that Y should refrain from doing so and, correlatively, Y's duty not to injure the trees are concurrently legal and equitable. Even prior to actual damage by Y, a suit in equity for an injunction could be maintained by X; and after actual damage by Y, X could maintain an action at law.

Example 11: If X has ownership and possession of certain land, and Y, a stranger, is about to walk across, X's right that Y should not commit this simple trespass and, correspondingly, the duty of Y not to do so are concurrently legal and equitable. In case of breach by Y, an action at law could be maintained by X; and equity would vindicate X's right by refusing an injunction sought by Y to restrain X from maintaining his vindicatory action at law; sometimes, by entertaining a bill for discovery in aid of X's action at law; sometimes, also, in case Y's act were being repeated from day to day, by granting an injunction.

Example 12: If B, even without consideration, has created a bond obligation in favor of A, at its maturity A's right that B should pay and, correlatively, B's duty to do so are concurrently legal and equitable. In case of breach a law court would give damages to A; and a court of equity would vindicate A's primary right by refusing an injunction sought by B to restrain A's vindicatory action at law; possibly, also, by granting discovery against B in aid of A's action; possibly also, in order to avoid multiplicity of actions or for some similar reason, by entertaining a suit directly against B.[34]

Examples 13, 14, 15, 16: More or less similar to the two cases last put are (13) X's right not to be damaged as to his person; (14) X's right not to be falsely imprisoned; (15) X's right not to be libeled; and (16) X's right that the affections of his wife shall not be alienated, etc.

Concurrent privileges and correlative concurrent "no-rights."

Example 17: In the ordinary case where J has not contracted to convey his property to K or done any other act relating to K, J's privilege of not conveying such property to K and, correlatively, K's "no-right" as to J's doing so are concurrently legal and equitable. J's privilege would be vindicated in a court of law by the refusal of a judgment for damages to K; and in a court of equity by the refusal of a decree for specific performance or damages.

Example 18: If R is the fee simple owner and possessor of certain land with ornamental trees thereon, R's privilege of cutting those trees down and, correlatively, the "no-right" of S or any other person as to R's not doing so, are concurrently legal and equitable. R's privilege would be vindicated in a court of law by the refusal to give judgment for damages to S or anyone else; and in a court of equity by the refusal of an injunction or damages to S or anyone else.

Examples 19, 20, 21: Similar to the case last put are (19) R's privilege of ordinary free speech; (20) his privilege of walking on the public sidewalk; (21) and his privilege of crossing neighboring land as to which he has a "right of way."

Concurrent powers and correlative concurrent liabilities.

Example 22: If B mails a letter to A offering to sell and deliver an ordinary cow for $50, A's jural power, by dropping a letter of acceptance in the box,

to impose a concurrently legal and equitable contractual obligation on B, and, correlatively, B's liability, after the offer has been received by A, may appropriately be called concurrently legal and equitable.

SECONDARY, OR REMEDIAL, RELATIONS

Concurrent rights and correlative concurrent duties.

Example 23: Referring to the facts of example 22, if B fails to deliver the cow after tender by A, A's secondary, or remedial right that B should pay him the difference between the contract price and the market price of the cow, and, correlatively, B's duty to pay such damages, are concurrently legal and equitable. See reasoning under example 11.

Concurrent privileges and correlative concurrent "no-rights."

Example 24: If S commits a violent assault on R, R's secondary, or remedial, privilege of self-defense,—that is, his privilege of inflicting reasonable bodily harm on S, and, correlatively, S's "no-right" as to R's inflicting such harm are concurrently legal and equitable. See reasoning under example 12.

Examples 25, 26: Similarly as regards (25) R's privilege of recaption in certain cases of forcible taking of his personalty by S, and (26) R's privilege of using reasonable force against the person of S, a trespasser, to eject him from R's land.

TERTIARY, OR ADJECTIVE, RELATIONS.

Concurrent rights and correlative concurrent duties.

Example 27: Referring to the facts of example 22, if A sues B at law to secure a judgment obligation for breach of the contract to deliver the cow, A's right that W, a witness, shall attend and testify and, correlatively, the duty of W to do so are concurrently legal and equitable. At law A's right might be vindicated by an action against W for damages, or by an action for a statutory penalty; and in equity by a refusal to grant an injunction against A in relation to any of such proceedings. Contempt proceedings could also be taken against W.

Example 28: So also A's rights against the judge and, correlatively, the duties of the latter are concurrently legal and equitable. Such rights of A may sometimes be vindicated at law by writ of mandamus or writ of prohibition; sometimes merely by appellate proceedings to secure "reversal" because of the judge's failure to do his duty; sometimes by impeachment proceedings based on such failure. In general, such rights are vindicated in equity by by refusal of an injunction to restrain A as regards any of those vindicatory proceedings.

Example 29: Similarly as regards A's rights against the sheriff and other judicial officers.

Concurrent privileges and correlative concurrent "no-rights."

Example 30: If A sues B at law to recover a judgment obligation against B for breach of the contract to deliver the cow, A's privilege of filing the papers necessary to "institute the action" and, correlatively, B's "no-right" as to such act on the part of A are concurrently legal and equitable. A's privilege would be vindicated at law not only by due recognition and efficacy being given to his papers in the subsequent stages of the proceeding, but also by refusal to give a judgment for damages against A in a separate action brought against him by B as for "malicious civil prosecution;" and in equity there would be similar vindication by the refusal of an injunction sought by B to restrain the bringing of the action. Contrast this case with example 56, infra.

Examples 31, 32, 33: Similarly as regards all other privileged acts by A incident to the "maintenance of the action" such as (31) service of summons, (32) entering of judgment, (33) levying execution, and the like.

B THE CONFLICT OF EQUITY AND LAW: A jural relation may be *exclusively equitable,*—that is, one recognized and vindicated exclusively by an equity court. As regards every such case there is a conflict, *pro tanto,* between some valid and paramount equitable rule and some invalid and apparent legal rule.[35]

PRIMARY, OR ANTECEDENT, RELATIONS.

Exclusive rights and correlative exclusive duties.

Example 34: Y is tenant for life "without impeachment of waste," and X is the remainderman in fee. X's equitable right that Y shall not cut ornamental trees, conflicts with and "repeals" X's legal "no-right;" or, correspondingly, Y's equitable duty conflicts with and "repeals" Y's legal privilege of cutting the trees, i. e., committing so-called "equitable waste."[36]

Example 35: If T holds Whiteacre in fee simple in trust for C in fee simple, C's equitable right in personam (i. e., special or "determinate," right) that T shall not cut down ornamental trees conflicts with C's legal "no-right;" and, correlatively, T's equitable duty not to cut down ornamental trees conflicts with his legal privilege of doing so.

Examples 36, 37, 38, 39: Similarly as regards all of C's other equitable rights in personam against T; e. g., (36) that T shall keep the place in repair; (37) that T shall pay over the rents and profits to C; (38) that T shall, on request, convey Whiteacre to C; (39) that T shall not without request convey Whiteacre to any stranger; etc.[37]

Example 40: Referring to the same trust case, C's equitable rights against all "third parties" having notice of the trust that they shall not accept a conveyance of title from T conflict with C's legal "no-rights;" and, correlatively, the equitable duties of such third parties conflict with their legal privileges of accepting such conveyance.

Examples 41, 42, 43, 44, 45: Similar conflicts exist as regards: (41) a mortgagor's exclusively equitable right to redeem mortgaged property after the mortgagee's "condition subsequent" title has become absolute at law; (42) a party's exclusively equitable right to specific performance in a case where he himself can make only part performance; (43) the equitable right of a partial assignee of a chose in action; (44) the equitable right of an assignee of a mere possibility; (45) the equitable right of a surviving joint debtor against the estate of a deceased joint debtor; and innumerable other instances of exclusively equitable rights.

Exclusive privileges and correlative exclusive "no-rights."

Example 46: If T holds Blackacre in fee simple on a passive trust for C in fee simple, C's equitable privilege of entering upon the land conflicts with his legal duty of not entering (i. e., trespassing); and, correlatively, T's equitable "no-right" that C shall stay off the land conflicts with his legal right that C shall stay off.[38]

Example 47: Similarly as regards all of C's equitable privileges of physical user and enjoyment of Blackacre.

Example 48: If T holds a bond obligation against C in trust for C, C's equitable privilege of not paying the amount thereof to T conflicts with his legal duty to do so; and, correlatively, T's equitable "no-right" that C shall make such payment conflicts with his legal right.

Example 49: In the old days, if X held a bond against Y and the latter paid it without taking either a release under seal or a surrender of the instrument, Y's equitable privilege of not paying the amount of the bond a second time conflicted with his legal duty of doing so; and, correlatively, X's equitable "no-right" that Y should pay a second time conflicted with X's legal right that Y should do so. By liberalization of the common law, the rule of the latter now accords with that of equity.

Example 50: Similarly as regards a bond promisor's equitable privilege of not paying the extra amount stipulated to become due by way of penalty for non-payment of the primary amount called for by the bond.

Exclusive powers and correlative exclusive liabilities.

Example 51: O, the owner of certain property may gratuitously declare himself trustee thereof for C. The power thus to create a trust is exclusively equitable; there is a legal disability to create such a trust. It may thus fairly be said that the rule of equity is in conflict with the rule of law.

Example 52: If W loans money from her separate estate to her husband H, W acquires an exclusively equitable right against H for the repayment thereof. W's exclusively equitable power thus to contract with her husband may fairly be said to conflict with her legal disability to do so, and, correlatively, the exclusively equitable liability of the husband may be said to conflict with his legal immunity.[39]

SECONDARY, OR REMEDIAL, RELATIONS.

Exclusive rights and correlative exclusive duties.

Example 53: If A on Jan. 1st contracts to convey realty to B on June 1st, and if B on June 1st performs all conditions precedent and concurrent, but A refuses and fails to convey the realty to B, B's ensuing equitable remedial right that A shall make specific reparation by actually conveying the realty to B conflicts with B's legal "no-right;" and, correlatively, A's equitable duty thus to make specific reparation conflicts with his legal privilege of not doing so. (That is, his only legal duty is to pay to B the difference between the market and the contract price of the realty.)

Example 54: If L, a tenant for life, takes the roof off of the fine old mansion house on the premises so as to expose it to the elements, the remainderman's ensuing equitable right that L make specific reparation by putting on a new roof conflicts with the remainderman's legal "no-right;" and, correlatively, L's equitable duty conflicts with his legal privilege. (That is, at law, L's duty is merely to pay damages; his estate may also be subject to a statutory forfeiture.)

Example 55: If T holds Whiteacre on a passive trust for C, and the latter enters on the land without the permission of T, C's equitable right that T shall not use reasonable force to eject C conflicts with C's legal "no-right;" and, correlatively, T's equitable duty to refrain from such self-help conflicts with his legal privilege of self-help.[40]

TERTIARY OR ADJECTIVE, RELATIONS.

Exclusive rights and correlative exclusive duties.

Example 56: Referring to the facts of example 55, if C is in possession of Whiteacre, and T is about to sue C in ejectment, C's equitable right that T should not take the initiatory steps in such action conflicts with C's legal "no-right;" and, correlatively, T's equitable duty not to take such steps conflicts with his legal privilege of doing so.[41] Contrast example 30, supra.

Example 57: So also as regards all other steps incident to such ejectment action at law.

Example 58: If A sues B in a certain action at law, A's equitable right that B make written answers to interrogatories by A (such answers to be used in the pending action as "admissions" against B) conflicts with A's legal "no-right;" and, correlatively, B's equitable duty thus "to make discovery" conflicts with his legal privilege of not doing so.

Exclusive equitable privileges and correlative exclusive "no-rights."

Example 59: If Y, by gross fraud practiced in the conduct of an action at law against X secures a judgment for $10,000 against X, X's equitable privilege of not paying the $10,000 to Y conflicts with X's legal duty to do so; and, correlatively, Y's equitable "no-right" that X shall pay the $10,000 conflicts with his legal right that X should do so. Equity would vindicate X's privilege by enjoining Y from bringing a new action based on the fraudulent judgment, or taking execution proceedings pursuant thereto.[42]

Exclusive equitable powers and correlative exclusive liabilities.

Example 60: In any suit for an injunction, the power of the chancery judge to impose the "injunction obligation" on the defendant, and correlatively, the liability of the defendant to have such "injunction" obligation imposed on him are exclusively equitable—i. e., capable of recognition and vindication only in a court of equity. The chancery judge's equitable power conflicts with his legal disability, and the defendant's equitable liability conflicts with his legal immunity.

C THE SUPREMACY OF EQUITY OVER LAW: in case of conflict, as distinguished from concurrence, a jural relation is finally determined by the equitable rule rather than by the legal.

1 Since, in any sovereign state, there must, in the last analysis, be but a single system of *genuine law,* since the various principles and rules of that system must be consistent with one another, and since, accordingly, all *genuine* jural relations must be consistent with one another, two conflicting rules, the one "legal" and the other "equitable," cannot be valid at the same moment of time: one must be valid and determinative to the exclusion of the other.

2 As a mere practical matter, the equitable rule would ordinarily prove "triumphant" because of the superior coercive procedure and remedies of the court of chancery.[43]

3 The theoretical finality and supremacy of the rules recognized and sanctioned by the court of chancery may be regarded as established ever since the year 1616,—the time when the notable controversy between Lord Chief Justice COKE and Lord Chancellor ELLSMERE in relation to the power and privilege of the chancellor to issue injunctions against the "enforcement" of common law judgments was settled by a prerogative decree of James I. upholding the chancery jurisdiction.

4 While the conflict as to ultimate jural relations may be regarded as having been settled since the year 1616, the great indirectness and complexity of the dual procedure involved in vindicating such jural relations continued until, in more modern times, the law courts and equity courts were amalgamated into a single system.

5 Even in jurisdictions where such amalgamation has taken place, traces of the old dual system are to be found, to some extent, in the rules of pleading and trial, and in the modes of thought and language involved in working out the various jural problems.

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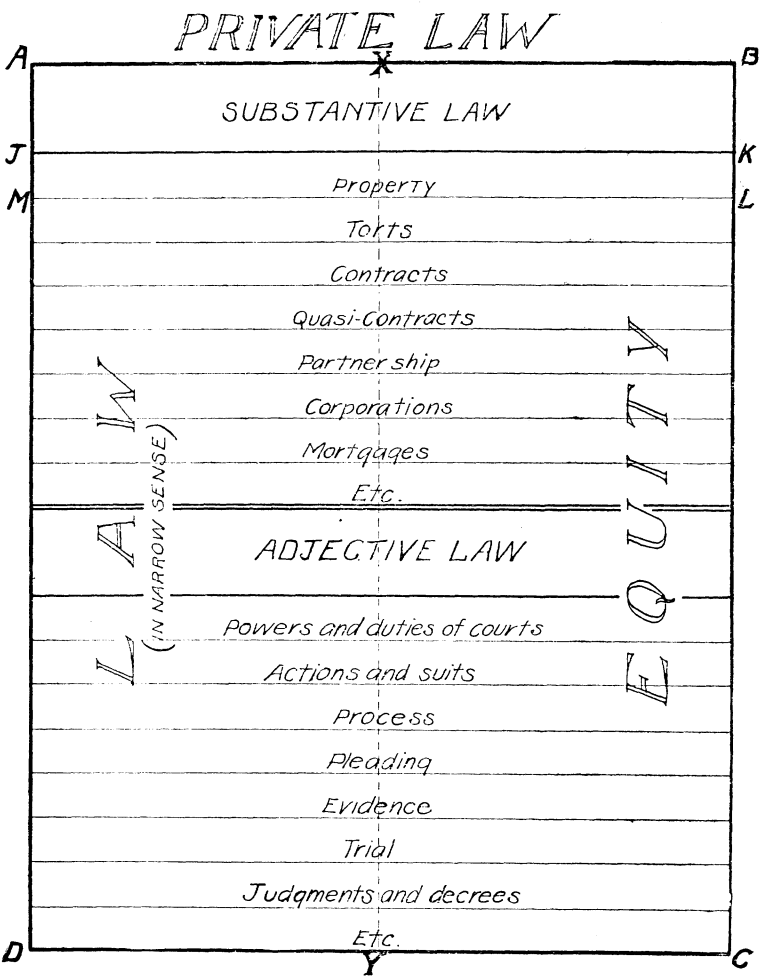
SUPPLEMENTAL NOTES.

[1] Compare Baildon, Sel. Cas. Ch. (Seld. Soc., 1896) Intro., p. xxix: "The general principles on which the Chancery was supposed to act in such matters as were not remediable at common law, are variously expressed by the terms 'conscience,' 'good faith,' 'reason,' and so on, and more rarely 'equity.' One or more of these or some similar expressions occur in nearly all the early Chancery bills. The rarest of these, curiously enough, is the one that has survived and given its name to all cases of this class, 'equity.' "

[2] THE POSITION OF EQUITY IN THE LEGAL SYSTEM.



1. A B C D represents entire field of private law.
2. A X Y D represents field of law (in narrow sense).
3. X B C Y represents field of equity.
4. J K L M represents field of property, partly law and partly equity (uses and trusts).

Explanatory notes:

(a) The line, X Y, is broken so as to indicate the interplay and (in many cases) the conflict between the rules of equity and the rules of law.

(b) The various topics, such as property, contracts, quasi-contracts, torts, etc., and courts, actions, process, etc., are not, and cannot be, used to indicate **mutually exclusive** divisions of the law. These various topics are simply those that appear in the average law school curriculum.

[3] This seems a necessary and obvious inference from the general nature of courts and their powers as exemplified both in the Anglo-American system and in Continental systems; and also from the early history of the law courts and their remedies. (See post, p. 561-4, n. 10.) But if more concrete proof were needed, we should,—as indicated in a subsequent part of the outline,—have abundant evidence from the comparatively late "fusion of law and equity," brought about both in England and in certain American States through appropriate legislation.

Quite apart from such legislation, however, the interesting juristic experience of Pennsylvania tends to indicate, rather strikingly, the same fundamental truth as to the possibility of working out all rights and remedies through a single system of courts. Not until 1836 did the courts of that State receive from the legislature an express and complete grant of ordinary chancery powers. As said by Mr. Fisher, "with the exception of sixteen years from 1720 to 1736, the Courts of Pennsylvania were, for over a hundred and fifty years, left in this predicament—that, in an enlightened community whose trade and commerce were growing every day, they were obliged to administer justice without the aid of a Court of Equity." (Administration of Equity through Common Law Forms, 1 Law Quart. Rev. 458.) In Torr's Estate (1830) 2 Rawle, 250, 253, Chief Justice Gibson said: "As we cannot hope to see a separate administration of equity, we are bound to introduce it into our system as copiously as our limited powers will admit." It must not be forgotten, however, that the problem of the Pennsylvania courts was a comparatively difficult one; for the process of "equitable" expansion of rights and improvement of court machinery began in the 18th century, when, of course, the "common law" system was no longer as flexible as it was in the 13th and 14th centuries. Yet, even so, in 1836 professional opinion seems to have differed on the question whether the above-mentioned legislative grant of equitable powers was necessary or desirable.

Compare, in relation to this matter, the comparatively late "equitable" innovations of Lord Mansfield, post, n. 10.

[4] For the general functions of equity as one of the three great agencies (Fiction, Equity, Legislation) for the amelioration of ancient legal systems, see the classical discussion in Maine, Ancient Law (Pollock's ed., 1906) pp. 29-30.

As regards the analogous development of equity (aequitas) in the Roman law under the administration of the praetor, see Maine, Ancient Law, Ch. III, and, in relation to similar phenomena under early Germanic law, see Goodwin, The Equity of the King's Court before the Reign of Ed. I., p. 12, quoted infra, n. 11.

[5] See Kerly, Hist. of Equity (1890) pp. 13-14: "The Norman Kings were not only the 'fountains of justice,' as our modern constitutional phrase puts it, but were its actual administrators, and probably the absolute power of issuing decrees in disputes between their subjects was the last part of their prerogative which would have been called in question. Complaint indeed was made of the issue of writs of execution without trial being had, and this Magna Carta forbids, but the right of the King to both try and determine was not disputed or curtailed till long after this period,[1] though he gradually ceased to exercise it, and Richard II was advised not to interfere 'in his proper person in any matter touching the law or party,' but to leave it to his council 'to do what belonged to law and his honour and estate.'" See also post, n. 11.

> [1] ("Statutes were passed under Edward I. and Edward III. to restrain the King's irregular interferences with the common law.")

[6] See Poll. & Maitl. Hist. Eng. Law (2nd ed., 1905) Vol. I., p. 194: "It was a very general rule that no action could be begun in the king's courts and that no action touching freehold could be begun anywhere without an 'original' or (as we might say) 'originating' writ, which proceeded from the chancery and served as the justices' warrant for entertaining the action."

Referring to the reign of Hen. II. (1154-1189), the same learned authors observe: "Closely connected with the introduction of trial by inquest is the growth of that system of original writs which is soon to become the ground-plan of all civil justice. For a long time past the King at the instance of complainants has issued writs. * * * Such writs were wont to specify with some particularity the subject-matter of the complaint. * * * As the King's interference becomes more frequent and more normal, the work of penning such writs will naturally fall into the hands of subordinate officials,

who will follow precedents and keep blank forms. A classification of writs will be the outcome; some will be granted more or less as a matter of course, will be brevia de cursu, writs of course. * * *

"Between these the would-be litigant must make his choice; he must choose an appropriate writ and with it an appropriate form of action. These wares are exposed for sale; perhaps some of them may already be had at fixed prices, for others a bargain may be struck. As yet the King is no mere vendor, he is a manufacturer and can make goods to order. The day has not yet come when the invention of new writs will be hampered by the claims of a parliament."

In another part of the invaluable work just quoted from, (Vol. I., pp. 170-171), we find the following interesting passage: "It was rather by decisions of the courts and by writs penned in the chancery that English law was being constructed. A comparison of a collection of formulas which Henry III. (1216-1272) sent to the Irish chancery in 1227 with Glanvill's treatise shows us that the number of writs which were to be had as of course, had grown within the intervening forty years. A new form of action might be easily created. A few words said by the Chancellor to his clerks—'Such writs as this are for the future to be issued as of course'—would be as effectual as the most solemn legislation. As yet there would be no jealousy between the justices and the Chancellor, nor would they easily be induced to quash his writs."

See also a good account in Jenks, Hist. of Eng. Law (1912) 43-45.

[7] See Spence, Equit. Jurisd. (1846) Vol. I., pp. 238, 324; Kerly, Hist. of Equity (1890) p. 15; compare Poll. & Maitl., Hist. Eng. Law (2nd ed., 1905) pp. 171, 196; Jenks, Hist. of Eng. Law (1912) p. 45.

[8] See Bigelow, Hist. of Procedure (1880) pp. 197, 198: "In the year 1258 the provisions of Oxford were promulgated; two separate clauses of which bound the chancellor to issue no more writs, except writs 'of course,' without command of the King and of his council present with him. This, with the growing independence of the judiciary on the one hand, and the settlement of legal process on the other, terminated the right to issue special writs, and at last fixed the common writs in unchangeable form; most of which had by this time become developed into the final form in which for six centuries they were treated as precedents of declarations."

In relation to the same matter, Pollock and Maitland observe: "Complaints against new and unaccustomed writs grew loud. The discontented prelates and barons demanded a real chancellor and one sworn to issue no writs, save 'writs of course,' without warrant from the baronial council. Under Edward I. (1272-1307) two different causes tended to give stability and finality to the cycle of original writs. On the one hand it became apparent that to invent new remedies was to make new laws, and events were deciding that only in a parliament of the three estates could new laws be made: even when the king was concerned, the list of actions was to be a closed list. On the other hand, chancery and chancellor had grown in dignity. * * * The days when the chancellor would often sit among the justices were passing away, the days for stiff official correspondence between the courts and the chancery had come." Hist. of Eng. Law, Vol. I., pp. 196-197.

Jenks, in his recent History of Eng. Law (1912) p. 45, puts the matter thus: "The invention of writs was really the making of the English Common Law; and the credit of this momentous achievement, which took place chiefly between 1150 and 1250, must be shared between the officials of the royal Chancery, who framed new forms, and the royal judges, who either allowed or quashed them. Before the end of the thirteenth century, the stream of new writs began to run dry."

See also Kerly, Hist. of Equity (1890) p. 9; Holdsworth, Hist. of Eng. Law (1903) Vol. I., p. 196.

[9] The defects of both the substantive rules and the adjective rules of the common law courts were, as indicated in the synopsis, the more permanent causes necessitating the continuous development and expansion of the chancellor's extraordinary, or equitable, jurisdiction. But it must be borne in mind that from the beginning of the practice of petitioning to the king, the council, and the chancellor for special relief down to nearly the end of the fifteenth century, many of such petitions, instead of being based on the failure of the common law courts to recognize the plaintiff's right or on any

inadequacy of the normal remedy to be had from such tribunals, were founded on the allegation that, because of violence, influence or corruption on the part of the defendant, or because of the poverty of the plaintiff, such normal remedy could not be secured.

As said by Baildon, Sel. Cas. in Ch. (Seld. Soc., 1896) Intro., pp. xxi—xxii, this "class was not concerned in any way with the doctrine of equity; and, some time toward the end of the fifteenth century, the court of chancery ceased to deal with them altogether. In the early days of that court, however, such cases formed by far the principal bulk of the work of the court. Such matters, as has already been pointed out, came within the jurisdiction of the Council. * * *

"The reasons in what I may call the Council cases, that is, those for which in theory the common law provided a remedy, are mostly concerned with the power and influence of the defendant. * * *

"In case 24, the plaintiff would have sued at Lincoln in the King's Bench, but could not find any one who dared to act as her counsel, for fear of the defendant's malice. * * *

"In case 35, it is stated that no writs or orders of the King will be obeyed, and no jurors will dare to do their duty in those parts, if the defendants are not punished. * * *

"In case 41, the defendant has so many evil doers confederated with him, and is of such horrible maintenance, that the plaintiff cannot recover at common law. * * *

"In Cal. i. xix., the plaintiff cannot sue at common law because he is in prison.

"In many cases the poverty of the plaintiff is urged as the sole reason why the chancellor should interfere."

Compare, also, Holmes, Early English Equity (1885) 1 Law Quart. Rev. 162-163.

[10] As regards the chancellor's power to create new writs, the important provisions of the Statute of Westminister II. were as follows:

II. (3) "And whensoever from henceforth it shall fortune in the Chancery, that in one case a writ is found, and in like case falling under like law, and requiring like remedy, is found none; the clerks of the chancery shall agree in making the writ; (4) or the plaintiffs may adjourn it until the next Parliament, and let the cases be written in which they cannot agree, and let them refer themselves until the next parliament; and by consent of men learned in the law, a writ shall be made, lest it might happen after that the court should long time fail to administer justice unto complainants."

This great statute may be considered (1) in relation to the development of the substantive rules of the law courts through the action on the case and its two special offshoots, assumpsit and trover; and (2) in relation to the procedural and remedial powers of these tribunals.

(1) **Matters of substantive law.** Commenting on the introduction of new writs under the above enactment, Mr. Kerly, in his History of Equity (1890), pp. 10-11, says: "The form of the writ was debated upon before, and its sufficiency determined by the judges, not by its framers, and they were, as English judges have always been, devoted adherents to precedent. In the course of centuries, by taking certain writs as starting points, and accumulating successive variations upon them, the judges added great areas to our Common Law, and many of its most famous branches, assumpsit and trover and conversion for instance, were developed in this way; but the expansion of the Common Law was the work of the 15th and subsequent centuries, when, under the stress of eager rivalry with the growing equitable jurisdiction of the Chancery, the judges strove, not only by admitting and developing actions upon the case, but also by the use of fictitious actions, following the examples of the Roman Praetor, to supply the deficiencies of their system."

In harmony with this passage from Mr. Kerly's work, we find the following in the late Professor Ames' History of Assumpsit, (1888) 2 Harv. Law Rev. 1, 14: "Jealousy of the growing jurisdiction of the Chancellors was doubtless a potent influence in bringing the common-law judges to the point of allowing the action of assumpsit. Fairfax, J., in 1481, advised pleaders to pay more attention to actions on the case, and thereby diminish the resort to Chancery (Y. B. 21 Ed. IV. 23, pl. 6); and Fineux, C. J., remarked, after that advice had been followed and sanctioned by the courts, that it was no longer necessary to sue a subpoena in such cases (Y. B. 21 Hen. VII. 41, pl. 66)."

Very similar to the remark of Fairfax, J., is the declaration so aptly made and so

frequently acted upon, nearly three centuries later, by Lord Mansfield in Bird v. Randall (1762) 3 Burr. 1345: "An action upon the case is founded upon the mere justice and conscience of the plaintiff's case, and is in the nature of a bill in equity, and, in effect, is so."

In this connection the student may profitably consider the many "encroachments" made in later times by the law courts on the field of equity, more especially through the action on the case and its chief offshoot, assumpsit. The "equitable" innovations introduced or fostered by Lord Mansfield and his colleagues during the latter half of the 18th century are especially noteworthy,—being exemplified by such cases as Moses v. Macferlan (1760) 2 Burr. 1005; Bird v. Randall (1762) 3 Burr. 1345; Price v. Neal (1762) 3 Burr. 1354; Eaton v. Jaques (1780) Dougl. 438; Doe dem. Bristowe v. Pegge (1785) 1 T. R. 758, n. (a). Lord Mansfield's efforts to liberalize legal doctrines by the infusion of equitable principles had varying degrees of success. While, for example, his opinion in Moses v. Macferlan, supra, served to place the doctrine of quasi-contracts on a firm foundation, the case of Doe v. Pegge, supra, allowing ejectment in favor of a cestui que trust, has been overruled. As observed by Lord Redesdale in relation to the latter doctrine, "Lord Mansfield had on his mind prejudices derived from his familiarity with the Scotch law, where law and equity are administered in the same courts." (Shannon v. Bradsheet, 1 Sch. & Lef. 66.)

(2) **Procedural and remedial powers of the law courts.** Referring to the Statute of Westminister II., Blackstone remarks: "Which provision (with a little accuracy in the clerks of the Chancery, and a little liberality in the judges, by extending rather than narrowing the remedial effects of the writ) might have effectually answered all the purposes of the court of equity, except that of obtaining a discovery by the oath of the defendant." (Comm., Vol. III., p. 52.)

In relation to the substantative law, this comment seems eminently sound,—supported, as it is, by the facts already noted. But Professor Ames, while apparently in agreement with Blackstone to the limited extent just indicated, observes concerning the above quoted passage: "Such an opinion betrays a singular failure to appreciate the fundamental difference between law and equity, namely, that the law acts in rem, while equity acts in personam. The difference between the judgment at law and the decree in equity goes to the root of the whole matter." (Law and Morals, 22 Harv. L. Rev. 97, 105, 106). Compare, also, Langdell, Eq. Plead. (2nd ed., 1883) Sec. 40.

Granting, however, the great importance of the more efficient procedural and remedial processes adopted by the courts of chancery, it would nevertheless be difficult to discover on mere a priori grounds why the law courts failed to increase their own efficiency by pursuing similar methods; so there still exists the interesting historical question whether the backwardness of the common law courts was due merely to deep-rooted conservatism and adherence to precedent, or to extrinsic conditions making it inexpedient for them to adopt a more drastic procedure, or to both of these suggested causes. The historians of the law marshall many facts indicating that a real problem is presented.

Even prior to the Statute of Westminister II. the law courts were accustomed to give specific relief rather than mere damages; and the writ of prohibition was essentially like the injunction so effectively employed by the court of chancery in later times.

Thus, referring more particularly to the reign of Hen. III. (1216-1272) Pollock & Maitland say, in their Hist. of Eng. Law (2nd ed., 1905) Vol. II., pp. 522-523: "An action for damages was a novelty. * * * We may doubt whether Glanvill ever presided at the hearing of such an action.

"This may for a moment seem strange. In later days, we learn to look upon the action for damages as the common law's panacea, and we are told that the inability of the old courts to give 'specific relief' was a chief cause for the evolution of an 'equitable jurisdiction' in the chancery. But when we look back to the first age of royal justice we see it doing little else than punishing crime and giving 'specific relief.' The plaintiff who goes to the king's court and does not want vengeance, usually goes to ask for something of which he is being 'deforced.' This thing may be land, or services, or an advowson, or a chattel, or a certain sum of money; but in any case it is a thing unjustly detained from him. Or, maybe, he demands that a 'final concord' or a covenant may be

observed and performed, or that an account may be rendered, or that a nuisance may be abated, or that (for sometimes our king's court will do curiously modern things) a forester may be appointed to prevent a doweress from committing waste. Even the feoffor who fails in his duty of warranting his feoffee's title is not condemned to pay damages in money; he has to give equivalent land. No one of the oldest group of actions is an action for damages. * * *

"But there is one all important action which is stealing slowly to the front, the action of trespass (de trangressione) against those who to a plaintiff's damage have broken the king's peace with force and arms. Though early precedents may be found for it, this fertile mother of actions was only beginning her reign in the last years of Henry III. (1216-1272)."

In the same work, at pp. 595-596, it is said: "Even when the source of the action is in our eyes a contractual obligation, the law tries its best to give specific relief. Thus if a lord is bound to acquit a tenant from a claim for suit of court, the judgment may enjoin him to perform this duty and may bid the sheriff distrain him into performing it from time to time. In Glanvill's day, the defendant in an action on a fine could be compelled to give security that for the future he would observe his pact. The history of Covenant seems to show that the judgment for specific performance (quod conventio teneatur) is at least as old as an award of damages for breach of contract. We may find a local court decreeing that a rudder is to be made in accordance with an agreement, and even that one man is to serve another. Nor can we say that what is in substance an 'injunction' was as yet unknown. The 'prohibition' which forbids a man to continue his suit in an ecclesiastical court on pain of going to prison, is not unlike that weapon which the courts of common law will some day see turned against them by the hand of the chancellor. But, further, a defendant in an action of Waste could be bidden to commit no more waste upon pain of losing the land, and a forester or curator might be appointed to check his doings. The more we read of the thirteenth century, the fewer will seem to us the new ideas that were introduced by the chancellors of the later middle ages. What they did introduce was a stringent, flexible and summary method of dealing with law breakers. The common law had excellent intentions; what impedes it is an old-fashioned dislike for extreme measures."

See also, as regards common law remedies more or less analogous to those of equity, Bigelow, Hist. of Proc. (1880) 53, 193-196; Co. Lit. 100 a. (discussing what he calls common law "writs of prevention").

Complementary to Pollock & Maitland's statement relating to the period prior to the Statute of Westminister II., is Holdsworth's excellent summary of the possibilities and tendencies existing shortly after its enactment. In his History of English Law (1909) Vol. II., pp. 249-250, the learned author says: "At first, possibly, the judges were inclined to give a wide construction to the clause of the Statute of Westminister II. empowering the Chancery to issue writs in consimili casu. In 1294 Bereford, J., said, "Where one comes to the Chancery and prays a remedy * * * no remedy having been previously provided, then, in order that no one may quit the court in despair, the Chancery will agree on the form of a writ, which writ shall serve him for his case, which before the framing of the writ was unprovided for."[1] But such broad views as these were tending to become inconsistent with the doctrine that, in general, new writs must be sanctioned by statute, as a later case of the same year shows.[2] But in spite of this narrower doctrine 'conscience' is sometimes referred to,[3] and perhaps even made the basis of an occasional decision.[4] Certainly its claims found some expression in the invention of the writ Audita Querela early in Edward III.'s reign.[5] And in the Year Books of Edward I., II., and III.'s reigns we see many premonitions of doctrines which in later years we associate chiefly with equity. It is necessary for Britton to state clearly that the law does not recognise an equity of redemption.[6] In the Y. B. 30, 31 Edward I. we see something very like the Chancery process of subpoena.[7] In the Y. B. 2, 3 Edward II. we seem to see the court giving relief against penalties,[8] and issuing something like a perpetual injunction.[9] Sometimes the specific execution of positive acts was ordered by the process of distraint.[10] But such ideas and such doctrines will gradually become less usual in the courts of Common Law. The increasing number and technicality of the ordinary forms and processes tended to concentrate attention upon

the application of ordinary rules and ordinary remedies to the facts of individual cases, and so to exclude that consideration and discussion of larger principles which in the preceding period had made for rapid development.

[1] Y. B. 21, 22 Ed. I. (R. S.) 322.

[2] Ibid 528, "Every writ brought in the king's court ought to be formed according to the common law or statute. * * * Every new writ should be provided by the common council of the realm;" the opposing counsel urges the opposite doctrine.

[3] Y. B. 13, 14 Ed. III. (R. S.) 96, **Stonore**, C. J., says, "We see on the one hand that according to good conscience and the law of God it would be contrary to what is right, if the plaintiff speaks the truth, that by such a fine, which is void, he should be disinherited; and on the other hand it is a strong measure, having regard to the law of the land, to take an averment which may annul the fine;" cp. Y. B. 18, 19 Ed. III. (R. S.) 58, 60—but the record is silent as to the argument founded on conscience.

[4] Y. B. 27 Ed. III. Mich. p. 20.

[5] Y. B. 17 Ed. II. (R. S.) 370, **Stonore**, C. J., says, "I tell you plainly that **Audita Querela** is given rather by equity than by common law;" vol. i 249.

[6] ii 128.

[7] Y. B. 30, 31 Ed. I. (R. S.) 194, **Berewick**, J., "We command you that under penalty of one hundred pounds you have the infant here before us on such a day."

[8] Y. B. 2, 3 Ed. II. (S. S.) xii, xiv 58.

[9] Y. B. 2, 3 Ed. II. (S. S.) xiv 74; cp. 30, 31 Ed. I. (R. S.) 324, a case where prohibition was made to do somewhat similar work—an anticipation of much later ideas, see vol. i, 406.

[10] Y. B. 18 Ed. III. (R. S.) 236, damages had been awarded in a plea of trespass for the non-repair of a sea wall, "And afterwards on the morrow **Thorpe** came and prayed that the judgment might be amended, inasmuch as it had not been adjudged that the defendants should repair the walls.—**Willoughby** gave judgment that they should repair the walls, and that they should be distrained to do so;" cp. Ramsey Cart. iii, no. 583 (1330-31) for something like a mandatory injunction.

In connection with the closing part of the passage just quoted from Holdsworth, we may well consider the suggestions made by Mr. Kerly in his History of Equity (1890) pp. 94, 95: "The work of the Ecclesiastical Chancellors was an exceedingly beneficial one, for it may well be doubted whether judges trained in the practice of the Common Law would ever have possessed the courage to interfere with its rules, in the face of the professional opinion of their brethren, or indeed have been sufficiently detached in mind to discover that the rules stood in need of correction. It were better, the judges held, in the case of actions on bonds paid without acquittance taken, that an individual should pay twice than that the law be changed, and it is certain that none but a great officer, wielding all the power of the King, could ever have enforced his decrees as the Chancellor did. The judges had comparatively little dignity or power. They eked out a miserable stipend by the suitors' fees, and were subject to removal at any time if they offended the King or the reigning favourite, but my Lord Chancellor, while his term of office lasted, was the greatest man, next the King, in the country, and in a time of lawlessness and anarchy often his orders alone could command respect."

As a final consideration bearing on the remedial procedure of the law courts, it is interesting and instructive to compare with the chancery methods of coercion the law courts' power of causing the arrest of a defendant on mesne process, i. e., by the writ of **capias ad respondendum**; and the nimbleness with which, by the aid of fictions, the King's Bench, the Exchequer and the Common Pleas extended the use of this writ to cover ordinary actions of debt.

This matter is discussed in Jenks, Hist. Eng. Law (1912) 169-137, 346-348.

[11] Compare Goodwin, The Equity of the King's Court before the Reign of Edward I., p. 12: "If it would seem to be true that Glanvill and Bracton borrow their conception of equity from the **aequitas** of the Roman law, they are, nevertheless, but applying new

terms to an institution as essentially Teutonic as Roman. In the early Germanic State, the king exercised a jurisdiction based on broader principles of right and justice than that of the ordinary tribunals; he was not in a like degree bound down to the formality of the law and could decide the case before his court according to principles of equity. * * * In the Carolingian period, the man who had suffered from the strictness and formality of the ordinary court, might seek alleviation (moderatio) from the King. * * * Although the Roman law, which reserved the exercise of equity for the consistorium principis, may well have had its influence on the court of the Frankish kings, nevertheless, as Professor Brunner clearly points out, the fact that the same equitable jurisdiction existed in Anglo-Saxon England, in Ireland, and in Sweden, proves its origin in a Germanic as well as a Roman institution."

In connection with this statement of Mr. Goodwin, may be noted the Secular Ordinance of Edgar (959-975): "Cap. 2. And let no one apply to the king in any suit, unless he at home may not be worthy of law or cannot obtain law. If the law be too heavy, let him seek a mitigation of it from the king. * * * "

In regard to the significance of this Ordinance as to the king's functions of administering justice in Anglo-Saxon times, see Poll. & Maitl. Hist. of Eng. Law (2nd ed. 1905) pp. 40-41.

As to the bearing of the king's "residuary jurisdiction" in the establishment of the court of chancery, see Pollock's chapter on "The Scales of Justice" in his Expansion of the Common Law (1904) pp. 67-72.

[12] Compare Holdsworth, Hist. of Eng. Law (1903) Vol. I., pp. 200-201: "During the whole of this period the relations between the Chancery and the Common Law Courts are close. The judges as members of the council took part in the Chancellor's decisions. They were sometimes made Chancellors. In Henry IV.'s reign (1399-1413) the commons complained that the judges were taken out of their courts to assist in discussing cases in Chancery. It was not till the Tudor period that this close connection between the Chancery and the common law judges ceased."

See also Spence, Eq. Jurisd. (1846) Vol. I., p. 329; Baildon, Sel. Cas. Ch. (S. S. 1896) Introd., p. xv.

[13] Stubbs, Const. Hist. p. 381, quoted in Poll. & Maitl., Hist. of Eng. Law (2nd ed., 1905) p. 193.

[14] See Jenks, Hist. Eng. Law (1912) p. 43: "Very soon after the Conquest, we begin to see writs issued from the royal Chancery for the purpose of influencing legal proceedings. * * * "

See also note 6, ante, p. 559.

[15] See Coke, 4th Inst., 79; Kerly, Hist. of Equity (1890) p. 49; Holdsworth, Hist. of Eng. Law (1903) Vol. I., pp. 235-237; Baildon, Sel. Cas. Ch. (S. S., 1896) Introd., p. xxi.

[16] Compare Baildon, Sel. Cas. Ch. (Seld. Soc., 1896) Introd., p. xix. After marshalling the available evidence, the learned editor concludes: "It seems clear that the Chancellor had and exercised judicial functions of his own as early as the reign of Richard II. (1377-1399), if not of Edward II. (1326-1377). Still the two courts (i. e., the Chancery and the Council) had not, up to middle of the fifteenth century, become entirely distinct."

Compare also Holdsworth, Hist. of Eng. Law (1903) Vol. I., p. 199.

[17] For these petitions and statutes, see Kerly, Hist. of Equity (1890) Ch. IV.

[18] See the good account in Wilson's Life of James I., pp. 94-95; Campbell, Lives of the Chief Justices (3rd ed.) Vol. I., p. 332; Kerly, Hist. of Equity, 109-116.

[19] Long before the Judicature Acts of 1873 and 1875, it should be remembered, a partial "fusion of law and equity" had been effected by certain acts of Parliament, more especially the important Common Law Procedure Act of 1854 (17 and 18 Vict. c. 125). By this act, secs. 78-86, the common law courts were empowered to allow parties to be interrogated by their opponents, to compel discovery of documents, to order the specific delivery of goods, to issue injunctions and to hear interpleader actions. Then, too, as a matter of the utmost importance, both "equitable defenses" and "equitable replications" were sanctioned.

See, as exemplifying the operation of this act in relation to "equitable replications"

De Pothonier v. De Mattos (1858) E. B. & E. 461, 466 (action by assignee of a debt against the debtor in name of assignor; plea of release by plaintiff; replication alleging that the assignee was the real party in interest and that defendant had notice before taking the release from the nominal plaintiff; replication held good as against demurrer).

Even without statutory authorization, the law courts had, ever since the latter half of the 18th century, devised a method of making it unnecessary for the assignee in such a case as the above to secure an injunction in equity restraining the defendant from pleading the unmeritorious release or other defense. As said in Gibson v. Winter (1833) 2 L. J. K. B. N. S. 130: "The courts of law have been in the habit of exercising an equitable jurisdiction upon motion, and setting such releases aside, or preventing the defendant from pleading them."

For a good instance of this latter procedure, see Legh v. Legh (1799) 1 B. & P. 445.

Another statute to be noted as a precursor of the Judicature Acts is Lord Cairns' Act, 21 and 22 Vict. (1858) c. 27, authorizing the chancery courts to award damages in certain cases where ordinarily they would have jurisdiction to grant either a decree for specific performance or an injunction.

[20] For a classification of the different states according to the various systems now prevailing, see Pom. Eq. Jurisp. (3rd ed., 1905) sec. 41.

[21] The best historical accounts of the "American Reformed Procedure" will be found in Hepburn, Development of Code Pleading, and in Pomeroy, Code Remedies.

[22] See Baildon, Sel. Cas. Ch. (S.S. 1896) Introd. p. xxix, quoted ante, p. 557 n. 1.

As said by Pollock, in his First Book of Jurisprudence (2nd ed., 1904) p. 37, "The normal and necessary marks, in a civilized commonwealth, of justice administered according to law" are "Generality, Equality, and Certainty." From the very nature of the case, these important attributes must have been wanting as regards the judicial action of the early chancellors. For similar reasons, the special abuses of a later time—i. e., under certain chancellors of Hen. VIII. and Elizabeth who assumed to disregard settled principles and precedents,—brought about the jesting comment of Selden, in his Table Talk, tit. Equity (circa 1654) Oper. tom. iv., p. 2028: "Equity in law is the same that the spirit is in religion, what everyone pleases to make it. Sometimes they go according to conscience, sometimes according to law, sometimes according to the will of the court. Equity is a roguish thing; for the law we have a measure, know what to trust to; equity is according to the conscience of him that is chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure the chancellor's foot. What an uncertain measure this would be! One chancellor has a long foot, another a short foot, another an indifferent foot; 'tis the same thing with the chancellor's conscience."

In this connection we may well consider the admirably luminous analogy drawn by Professor Roscoe Pound in a recent address, "The Organization of Courts," delivered before the Law Association of Philadelphia, Jan. 31, 1913. Referring to the present widespread tendency to establish various administrative or executive commissions freed, as far as possible, from the specific limitations of substantive and procedural rules so characteristic of the ordinary courts, the learned speaker said: "An instructive parallel may be found in the history of our legal system. * * * The movement away from the common law was a movement from judicial justice administered in courts to executive justice administered in administrative tribunals or by administrative officers. In other words, it was a reaction from justice according to law to justice without law, and in this respect again the present movement away from the common law courts is parallel.

"Equity, both at Rome and in England, began as executive justice. It was a reversion to justice without law. The praetor interposing by virtue of his imperium, the emperor enforcing fidei-commissa because, as the Institutes say, he was 'moved several times by favor of particular persons,' the Frankish king deciding, not according to law, but secundum aequitatem for those whom he had taken under his special protection, and the Chancellor granting relief 'of almes and charitie,' acted without rule in accordance with general notions of fair play and sympathy for a wronged or weaker party. The executive justice of today is essentially of the same nature. It is an attempt to adjust the relations of individuals with each other and with the state summarily, largely according to the notions of an executive officer for the time being as to what the general interest and a square deal demand, unencumbered by many rules. The fact

that it is justice without law is what commends it now to a busy and strenuous age. * * *."

See also Professor Pound's article on "Executive Justice" (1907) 7 Columb. Law Rev. 137, 144-145.

[23] See, to this effect, Black. Com. (1765) Vol. III., p. 432; Spence, Eq. Jurisd. (1846) Vol. I., pp. 413-414; Gee v. Pritchard (1818) 2 Swanst. 402, 414; McKim v. Odom, (1835) 12 Me. 94, 99.

In the well-known case of Gee v. Pritchard, just cited, Lord Eldon expressed the point thus: "The doctrines of this Court ought to be as well settled, and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case. I cannot agree that the doctrines of this Court are to be changed with every succeeding judge. Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this Court varies like the Chancellor's foot."

The beginning of something like a system of equitable principles and rules might be said to date from the first half of the 17th century.

Professor Pound, in commenting on the matured development of equity, makes a thoughtful application to the very recent tendencies in this country toward "justice without law." "The recrudescence of executive justice must be attributed to the archaic organization of our courts, to cumbrous, ineffective and unbusinesslike procedure, and to the waste of time and money in the mere etiquette of justice, which, for historical reasons, disfigure American practice. Recognizing this, we may take hope from legal history. For, although Coke lost his quarrel with the Court of Chancery, the other Romanized courts perished, and Chancery was made over gradually along common-law lines. The equity made in the Court of Chancery and the law as to misdemeanors made in the Star Chamber became parts of our legal system; it is not too much to say they became parts of the common law. The common law survived and the sole permanent result of the reversion to justice without law was a liberalizing and modernizing of the law." (Address on "The Organization of Courts.")

[24] The effect of the law court's ordinary judgment for money is twofold: (1) to "merge" or extinguish the supposed preexisting obligation on which the action has been based; and (2) to create a new and independent obligation. If the latter is not performed or discharged, a new action can, in most jurisdictions, be based thereon; though, in some of the latter, costs are denied to the plaintiff if the new action be brought without good grounds. See Freeman, Judgments (4th ed., 1898) sec. 432 et seq.

It goes without saying, however, that, in order to avoid an endless chain of judgments, the more usual procedure is to secure satisfaction by sheriff's execution sale of the judgment debtor's property.

[25] The power of arresting a defendant on mesne process and likewise the power of final execution against the person of the judgment debtor are now greatly limited and regulated by constitutional and legislative enactments.

For the origin and history of these remedies in England, see Jenks, Hist. Eng. Law (1912) 169-173; 346-348; Poll. & Maitl. Hist. Eng. Law (2nd ed., 1905) Vol. II., pp. 596-597.

[26] As contrasted with modern methods, the very general rule of the ancient common law courts was to award some form of specific relief, rather than non-specific. See ante, pp. 561-4, n. 10.

[27] The best statement as to the effect of an equity court's decree in creating a new and independent obligation to do as directed by the decree is to be found in Mr. Justice Holmes' concurring opinion in the comparatively recent case of Fall v. Eastin (1909) 215 U. S. 1, 14; see also the able opinion in Burnley v. Stevenson (1873) 24 Oh. St. 474, 478-479; and the equally cogent opinion of Van Syckel, J., dissenting, in Bullock v. Bullock (1894) 52 N. J. Eq. 561.

A chancery decree ordering a party to pay a definite sum of money creates, ex proprio vigore, a new and independent obligation to pay the stated amount. Is this new obligation exclusively equitable, or is it concurrently equitable and legal as to its operation?

As regards a foreign decree of this character, it is clear that performance of the resulting obligation, as such, could not be coerced by contempt proceedings, and that, likewise, proceedings in the nature of execution could not be had (see Bullock v. Bullock (1894) 52 N. J. Eq. 561, per Magie, J.); this rule being in harmony with that which denies direct execution of an ordinary common law judgment rendered by a foreign court. McElmoyle v. Cohen (1839) 13 Pet. 312; Lamberton v. Grant, (1901) 94 Me. 508. As regards the latter, the appropriate proceeding is an action of debt based directly on the judgment.

Since, as just observed, contempt or execution proceedings are unavailable to the decree obligee, it is well settled that an action of debt may be based directly on a foreign chancery decree calling for money; for otherwise there would be a failure of justice in the domestic forum. Henley v. Loper (1828) 8 B. & C. 16; McKim v. Odom (1835) 12 Me. 94; Moore v. Adie's Admr. (1849) 18 Ohio, 430. This doctrine would seem to mean, in net effect, that the chancery decree creates, as regards the forum, an obligation concurrently equitable and legal. That being so, apart from the purely practical distinction that direct means of coercion or execution are available to the obligee of a domestic decree—that is, in the very court rendering it,—there seems to be no good reason for differentiating the obligatory effect of such a decree from that of a foreign decree. Consistently with this view, some authorities recognize even a domestic chancery decree of the above mentioned character as affording the basis for a common law action of debt, or some similar action. Ames v. Hoy (1859) 12 Cal. 11, 20; Howard v. Howard (1818) 15 Mass. 196; Dubois v. Dubois (1826) 6 Cowen, 493, 496; contra, Carpenter v. Thornton (1819) 3 B. & Ald. 52.

At first glance, this doctrine might seem contradictory and illogical to the student: How can the vindicatory proceedings and final decree of a court of equity—such proceedings being based perhaps on a precedent obligation exclusively equitable in character—have as their operative, or constitutive, effect the creation of an obligation concurrently equitable and legal? There is, however, no contradiction whatever. When, for instance, a trustee makes certain secret profits and thus incurs an equitable obligation to account for them and to pay to his beneficiary the amount of his wrongful gains, it is true that under the rules of law (in the narrow sense) no legal obligation is created, or constituted, by the facts in question. But the facts and acts culminating in the decree of the Chancellor ordering the trustee to pay a definite sum of money are entirely new and distinct quantities. The operative, or constitutive, effect of the latter may well be to create an obligation that is legal as well as equitable in character. As said by Chief Justice Robertson, in Williams v. Preston (1830) 3 J. J. Marsh. 600: "Although there may have been a time when the common law judge would not have sustained an action of debt on a decree, it is not so now."

[28] It should be borne in mind that the early chancellors being almost invariably bishops or archbishops, adapted much of their procedure and remedies after the pattern afforded by the ecclesiastical courts. See Langdell, Eq. Plead. (2nd ed., 1883) secs. 1, 42.

[29] For the procedure and practice relating to the writs of sequestration and assistance, see Daniell, Chanc. Pract. (1st Am. ed., 1848) *627-650; *723-724.

[30] When a court of equity has neither the ordinary jurisdiction over the person of the defendant, nor the statutory jurisdiction over the res, there is, of course, no "power to hear and determine" in the regular way; that is, there is a want of jurisdiction in the proper sense of that term.

But, curiously enough, the expression, "want of equity jurisdiction," is inveterately employed in a loose and confusing way to indicate merely that a case presented to a court of equity is such that according to the principles and rules governing equitable primary, remedial, and adjective rights, it would be error for the court to exercise its admitted power to grant the relief asked. The case containing the best discussion of this important distinction between the actual jurisdiction of a court of equity and error in its exercise, is People v. McKane (1894) 78 Hun, 154; 28 N. Y. Supp. 981.

Thus, for example, if, in a suit for breach of contract to sell ordinary personalty, a court of equity should render a decree for damages, the decree, though erroneous as against seasonable objection, would be good until set aside by some form of direct attack. Bank of Utica v. Merserau (1848) 3 Barb. Ch. 527, 574.

[31] The difficulty not being jurisdictional in the strict sense, a court of equity will, where the grounds for such relief are especially strong, grant a mandatory injunction or affirmative decree requiring acts to be done in a foreign jurisdiction so as to abate what would otherwise be "continuing torts." Salton Sea Cases (1909) 172 Fed. Rep. 792 (C. C. A.); Rickey L. & C. v. Miller (1910) 218 U. S. 258.

[32] The classification of all jural relations into three groups,—primary (or antecedent), secondary (or remedial), and tertiary (or adjective),—is not based on any essential differences as to their intrinsic character. On the contrary, such a division is adopted merely for convenience of exposition and reference; and no doubt opinions might differ as to the particular class to which a given relation should be assigned.

[33] The various "examples" relating to "the concurrence of equity and law" and "the conflict of equity and law" will possibly be better understood if the following scheme of jural relations be kept in mind:

Jural Opposites	right	privilege	power	immunity
	"no-right"	duty	disability	liability
Jural Correlatives	right	privilege	power	immunity
	duty	"no-right"	liability	disability

No single term seems available to express the mere opposite, or negation, of a right (in the most strict sense of the latter word).

That a jural privilege is the exact opposite, or negation, of a jural duty, see Thomas v. Sorrell (1673) Vaughan, 330, 351.

[34] No doubt the jural relations which in the text are called "concurrently legal and equitable" have, according to the more usual, if not invariable, practice, been styled "exclusively legal," or simply "legal;" and it may be conceded that at first glance the latter usage is entirely plausible. It is submitted, however, that, as a matter of analysis, the division of all jural relations into but two classes—those concurrently legal and equitable, and those exclusively equitable—is correct in every fair sense of the terms involved, and that any other division makes for confusion of both thought and language. There is, to be sure, a third group of rules which, being very different from the "concurrent" rules now under consideration, might, with prima facie correctness, be called "exclusively legal." But, as will be more fully urged hereafter, each and every one of the latter being in conflict with some paramount and determinative equitable rule, proves, in the last analysis, to be only apparent, so far as genuine law is concerned. For that reason, in any true classification this third group of so-called rules must be excluded.

As regards both law and equity, all primary, or antecedent, relations and all secondary, or remedial, relations can, in general, be ascertained only by inference from the purely adjective juridical processes, that is, by inference from either affirmative or negative action regularly to be had from the particular courts from which a judgment or decree may be sought. As said by Maitland, in relation, more particularly, to the early law: "De Natura Brevium, Of the Nature of Writs,—such is the title of more than one well known text-book of our mediaeval law. Legal Remedies, Legal Procedure, these are the all-important topics for the student. These being mastered, a knowledge of substantive law will come of itself. Not the nature of rights, but the nature of writs must be his theme. The scheme of 'original writs' is the very skeleton of the Corpus Juris." (History of the Register of Original Writs [1889] 3 Harv. L. Rev. 97.)

Applying this eminently sound suggestion to the bond case put in "example 12," suppose, in the very early days, B had paid the bond at or before maturity, but had failed to take a release under seal or a surrender of the bond instrument. In that situation the legal right of A and the corresponding legal duty of B would, according to the rule now obsolete, continue to exist, despite the fact of payment. But equity would say that, as a matter of substance, B had the privilege of not paying again, and that, correlatively, A had no right against B. If, therefore, A were to threaten an action at law, B could secure an injunction from equity restraining A from doing the acts constituting "the bringing of the action." So, too, it goes without saying that A could not secure "discovery" against B from a court of equity.

But, on the other hand, if the bond has not been actually paid, it is clear that equity indorses and sanctions the legal primary right of A. If no ordinary affirmative

suit can be maintained in equity, that must be because the remedial machinery of the law court is able to give adequate relief; and equity indorses and sanctions such remedial proceeding in the law court by refusing an injunction against it. Generally speaking, moreover, to the extent that the law court's remedy may not be adequate, equity stands ready to lend a hand and give direct affirmative relief. See Southampton Dock Co. v. Southampton Harbour & Pier Board (1870) L. R. 11 Eq. 254, 263. If, for example—again referring primarily to days gone by—A needed the testimony of B for the action at law, a separate proceeding in equity could be brought for that limited purpose,—that is, to secure discovery. In such a case it might fairly be said that the law tribunal and the equity tribunal were acting together as a single court. As Coke observed in relation to cases where a chancery court sends an issue of fact to a law court to be tried, "for that purpose both courts are counted but one." 4 Inst. 79. And, of course, it will not be forgotten that according to the very early practice in England and the modern practice in some American jurisdictions, a mere bill for discovery sufficed as a foundation for praying and securing complete and final relief on the theory of avoiding multiplicity of suits. Besides all this, it is clear that under various other circumstances the bond right of A might get direct vindication by the remedial machinery of a court of equity. If, for example, A held such bond right in trust for X, but refused to proceed against B, X might proceed in a court of equity against both A and B and get a decree for payment of the amount directly to X. See the exceptionally instructive opinion in Fletcher v. Fletcher (1844) 4 Hare, 67, 76-78. Similarly, if A, being the unencumbered owner of the bond right, were to assign half of it to M, either A, the assignor, or M, the partial assignee, might sue in equity for a decree ordering B to pay half the amount of the bond to A and the other half to M.

So, in general, what are commonly called "legal" rights are, when justice demands, vindicated in equity by bills for discovery, bills for an accounting, bills to quiet title, bills of interpleader, bills of peace and proceedings undertaken to avoid "multiplicity" or "circuity" of action; and, independently of these affirmative remedies, the mere refusal of a court of equity to enjoin the plaintiff's action at law is, as has already been suggested, a clear and decisive equitable vindication of the primary and remedial rights on which such action at law is predicated.

When a jural relation is such as to be recognized and vindicated only in equity, it is, according to general usage, called "exclusively equitable,"—for instance, the right of a cestui against his trustee; and that usage seems justified by reason. Why, then, in aid of clear thinking, shouldn't all other jural relations be considered, by a precisely similar process of reasoning, "concurrently legal and equitable?"

[35] Compare Lord Chief Justice Hale, in Roscarrick v. Barton (1671) Cas. in Ch. 217: "By the growth of equity on equity, the heart of the common law is eaten out, and legal settlements are destroyed."

Compare also Lord Hardwicke, in Paget v. Gee (1753) Amb. 807, 810: "When the court finds the rules of law right, it will follow them, but then it will likewise go beyond them."

[36] The conflict between the equitable and the legal rule as regards "equitable waste" is, with some hesitation, conceded by Professor Maitland, at page 157 of his Lectures,—this being one of the two or three instances in which alone any opposition between law and equity is admitted by the learned author: "Was there a conflict about (so-called) equitable waste? Perhaps there was. If a tenant for life, made unimpeachable for waste, cut down ornamental timber, he could not be made to pay damages in an action at law, but equity would prevent him from so doing by injunction, or if he did it would call him to account. So we might here say that equity did consider that he must pay for his act, while law held that he need not. But it is needless to speculate about this matter for the (Judicature) Act specially provided for it."

Just why Maitland should have any hesitation as to this case is not clear. Suppose that a statute of yesterday provided that a tenant "without impeachment" should be privileged to cut ornamental trees; and assume, further, that a statute of today were to declare that any tenant "without impeachment" should be under a duty not to cut ornamental trees. Would any one hesitate to admit that the two statutes would be in conflict with each other, and that the first would be repealed by the second? A similar comparison with inconsistent statutes may be helpful in seeing the conflict of law and equity as regards the various other examples given in the text.

At this point, however, it may be necessary to guard against misunderstanding. When, in example 34, it is said that the legal rule is "annulled," **pro tanto**, by the equitable rule, this refers to the very jural relation under consideration, and to that alone. It is meant simply that, in the last analysis, Y **is** under a duty not to cut ornamental trees. As said by Lord Justice Turner, in Micklethwait v. Micklethwait, 1 De G. & J. 504, 524: "This doctrine of equitable waste, although far too well settled in the court to be now in any way disturbed is (it is to be observed) an **encroachment** upon a **legal right**,"—the learned judge here meaning, of course, what would, with greater discrimination, be expressed as "a legal privilege."

As regards that particular relation, the supposed legal rule asserting the privilege is really invalid. It is, to that extent, only an **apparent** rule, so far as **genuine** law is concerned. But such "legal rule," though invalid, may have important connotations as to independent (and valid) legal rules governing certain other closely associated jural relations. Thus, e. g., despite the conflict in question and the supremacy of the equitable rule, it would still be **the duty of the common law judge**, in case an action at law were brought against Y, to sustain a demurrer as against a declaration alleging the true facts of the case.

Conversely, even though a legal primary right conflicts with an equitable "no-right," it would be the duty of the common law judge to overrule a demurrer to a declaration setting forth such supposed legal right and its violation, and, ultimately, to render judgment for the plaintiff; and, of course, an execution sale based on such judgment would be valid. See example 46, and note 38, **infra**. These independent (and valid) jural relations, though **connoted** by the original (invalid) legal right in question, must be carefully distinguished from the latter.

[37] As will be remembered, Maitland relies upon the trust as his leading example to show, as he claims, that the Judicature Act of 1873 "found no conflict, **no variance even**, between the rules of the common law and the rules of equity." (See quotation given ante, p. 542.) More specifically, he remarks: "Equity did not say that the **cestui que trust** was the owner of the land, it said that the trustee was the owner of the land, but added that he was bound to hold the land for the benefit of the **cestui que trust. There was no conflict here.**"

[38] See Anon. Y. B. 4 Ed. IV., (1464) fol. 7, pl. 9. (Common Pleas. Action of trespass by feoffee to uses against **cestui que use** who had entered on the land. The use was pleaded in defense. Judgment for plaintiff. **Catesby** (for the cestui): "The law of chancery is the common law of the land, and if there the defendant shall have advantage of such a feoffment, why not likewise here? **Moyle**, J.: "That cannot be in this court as I have told you, for **the common law of the land varies in this case from the law of chancery, etc.**"

[39] See Woodward v. Woodward, 3 De G., J. & S. 672, per Lord Chancellor Westbury: "Wisely or unwisely this court has established the independent personality of a **feme covert** with respect to property settled to her separate use. It is a remarkable instance of legislation by judicial decision **whereby the old common law has been entirely abrogated** and the power of the wife to contract with her husband has been established. I do not go so far as to say that in the bare case of a sum of money, a part of the income of her separate estate, being handed over by her to her husband, this court would of necessity raise an assumpsit for the repayment of the money so handed over. But it is quite clear that if money, part of the income of her separate estate, be handed over by her to her husband upon a contract of loan, she may sue her husband upon that contract."

[40] See Stith v. Lookabill (1874) 71 N. C. 25, **per** Pearson, C. J.; Walsh v. Lonsdale (1882) 21 Ch. D. 9, 15.

[41] See Stith v. Lookabill, **supra.**

[42] Compare Dobson v. Pearce (1854) 12 N. Y. 156, 165.

[43] But not always: the chancery defendant sometimes preferred to stay in jail. See, e. g., J. R. v. M. P. (1459) Y. B. 37 Hen. VI., fol. 13, pl. 3; Attorney-Gen. v. Day (1748) 1 Ves. Sr. 218, 224, referring to a case where the chancery defendant preferred to stay in jail till death rather than obey the decree.

In the early days open conflicts occasionally occurred as a result of the law courts' granting a writ of **habeas corpus** in favor of a party who had been imprisoned for disobedience to the chancellor's decree.